In The

Supreme Court of the United States

October Term, 1978

NO. 78-895

EVERETT SATTERFIELD,

Appellant,

vs.

SUNNY DAY RESOURCES, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

MOTION TO DISMISS

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Appellee in the above-entitled case moves to dismiss the appeal on the following grounds:

1. The federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the Courts of Wyoming.

2. The appeal does not present a substantial Federal question; and further, this case is not one for appeal.

3. The judgment of the Supreme Court of the State of Wyoming rests on an adequate non-federal basis.

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OPINION BELOW

The opinion of the Supreme Court of the State of Wyoming is reported in 581 P. 2d 1386 (1978).

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STATEMENT OF THE CASE

On March 9, 1976, Plaintiff and Appellee Sunny Day Resources, Inc., hereinafter referred to as Appellee, filed its Complaint in the District Court of the Sixth Judicial District within and for the County of Weston, State of Wyoming, alleging that Everett Satterfield, Defendant and Appellant, hereinafter referred to as Appellant, did convert to his own use certain personal property owned by Appellee. An Answer was filed on behalf of Appellant on May 3, 1976, generally denying the allegations contained in Appellee's Complaint.

Thereafter, on July 7, 1976, a notice of taking Appellant's deposition was served on Appellant's attorney of record. Neither Appellant nor his attorney appeared at the time scheduled for the deposition or entered an objection to the taking of the deposition.

At the request of Appellee, the trial court on September 8, 1976, pursuant to Rule 37 (d), W. R. C. P. and Rule 37 (b) (2) (c), W. R. C. P., entered a partial default judgment against Appellant, stating that:

> A judgment by default is awarded the plaintiff on the issue of whether or not the defendant unlawfully sold . . . (certain personal property) . . . and converted the proceeds of this sale to his own personal use. The plaintiff will still be required to prove that it was the owner of the above described property at the time of conversion by the defendant, and the market value of the above described property at the time of conversion.

Appellant on May 31, 1977, filed a second Answer admitting the sale of the property. Trial was had on June 6, 1977, which trial resulted in a judgment against Appellant. During this trial, Appellant did not raise any Federal Constitutional questions nor enter any objections, based upon Federal Constitutional rights to evidence received pertaining to any of the elements of conversion, whether or not these elements may yet have been at issue.

Appeal was taken from the judgment of the Trial Court to the Wyoming Supreme Court. The issues raised by Appellant and as stated by the Wyoming Supreme Court are as follows:

1. Abuse of discretion by the District Court in its Order of Partial Default Judgment;
2. Failure of proof of all necessary elements of conversion;
3. Valuation testimony accepted by the District Court;

4. Property and/or security interest of Appellant in property converted.

Appellant did not raise any Federal Constitutional questions on appeal. The validity of Rule 37 (d), W. R. C. P. and Rule 37 (b) (2) (c), W. R. C. P., collectively referred to as Wyoming default statute by Appellant, was not questioned by Appellant in any manner. Rather the thrust of his appeal was that the granting of the partial default judgment by the Trial Court was an abuse of discretion. The decision of the Trial Court was affirmed by the Wyoming Supreme Court in an opinion which did not discuss or pass upon any Federal Constitutional questions.

A Petition for Rehearing was filed by Appellant on August 25, 1978, and in which he raised the following issues:

I. The Appellant's property was taken from him without due process of law.

II. The Trial Court permitted evidence to be presented by the Appellee regarding issues which had already been determined by the Trial Court (see Order of Court dated September 8, 1976), which was prejudicial to Appellant's rights and prevented him from having a fair trial.

These general averments are the first instance in which Appellant attempted to raise any Federal Constitutional questions. They do not expressly raise the issue of the validity of the Wyoming default statute, but instead raise the issue of the fairness of trial due to improper notice as to the questions to be litigated. The Petition for

Rehearing was denied by the Wyoming Supreme Court without opinion.

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ARGUMENT

1. The federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the courts of Wyoming.

Prior to the Petition for Rehearing filed after the decision of the Wyoming Supreme Court, Appellant did not raise any Federal Constitutional questions. The validity of the Wyoming default statute was never challenged. The Supreme Court of the United States has consistently ruled that in order for its jurisdiction to be invoked on appeal from state courts, it must appear that the Federal questions involved were raised in the state courts at the proper time. *Mutual Life Ins. Co. v. McGrew,* 23 S. Ct. 375, 188 U. S. 291, 47 L. Ed. 480 (1903); *Charleston Fed. Sav. & L. Assoc. v. Alderson,* 65 S. Ct. 624, 324 U. S. 182, 89 L. Ed. 857 (1944); *Hulbert v. Chicago,* 26 S. Ct. 617, 202 U. S. 275, 50 L. Ed. 1026 (1906).

The attempt by Appellant to raise Federal questions for the first time in his Petition for Rehearing after the decision was entered by the Wyoming Supreme Court was improper. *Hanson v. Denckla,* 78 S. Ct. 1228, 357 U. S. 235, 2 L. Ed. 2d 1283 (1958); *Radio Station WOW, Inc. v. Johnson,* 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092 (1945). Emphasis must be given to the fact that the Petition for Rehearing was denied without opinion. cf. *Bailey v. Anderson,* 66 S. Ct. 66, 326 U. S. 203, 90 L. Ed.

3 (1945), rehearing denied 66 S. Ct. 228, 326 U. S. 691, 90 L. Ed. 407.

The Federal question which Appellant is attempting to raise pertains to the propriety of the trial had in the state court. We submit the proper time to raise this question was at the trial.

Wyoming law states that constitutional questions not raised in the trial court will not be considered on appeal. *In re Shreve,* 432 P. 2d 271 (Wyo. 1967); *Knudson v. Hilzer,* 551 P. 2d 680 (Wyo. 1976). This state procedural requirement applies equally to non-constitutional issues, such as reviewing the admission of evidence where no objection is made in the trial court. See, *Boyer v. Bugher,* 19 Wyo. 463, 120 P. 171 (1912).

2. The appeal does not present a substantial federal question; and further, this case is not one for appeal.

The Appellant has attempted to phrase the Federal question which he seeks to raise in terms of the constitutionality of the Wyoming default statute as applied to this case. However, a careful consideration of this case should suggest that the only issue which is involved concerns the propriety of the conduct of the trial court in receiving evidence on and litigating questions which may not have been at issue. Conduct which was not compelled or even suggested by the Wyoming default statute. Rephrasing the issue sought to be raised so that it concerns only the conduct of the trial by the trial court makes it apparent that no substantial Federal question is presented and that this case is not one for appeal under United States Code Title 28, Section 1257 (2).

3. The judgment of the Supreme Court of Wyoming rests on an adequate non-federal basis.

As previously explained, Appellant did not question the trial had in this case on Federal Constitutional grounds until he filed his Petition for Rehearing. This does not comply with the procedural requirements established by the Wyoming Supreme Court. The decision of the Wyoming Supreme Court in denying Appellant's Petition for Rehearing clearly rests on an adequate non-federal basis. Review by the United States Supreme Court is, therefore, precluded. *Brown v. Massachusetts,* 12 S. Ct. 757, 144 U. S. 573, 36 L. Ed. 546 (1892); *Erie R. Co. v. Purdy,* 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847 (1902).

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CONCLUSION

For all of the foregoing reasons, Appellee moves that this appeal be dismissed.

Respectfully submitted,

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